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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1097

EVANS REAMER & MACHINE COMPANY,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. _____.

EVANS REAMER & MACHINE COMPANY,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Evans Reamer & Machine Company, plaintiff below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in this case on November 9, 1967. A copy of the opinion of the Court of Claims, ____ F. 2d ____ (not published yet) is printed in the Appendix hereto.

OPINION BELOW.

The opinion of the Court of Claims (Appendix to the Petition, pp. 1a-61a) is reported at ____ F. 2d ____ (1967).

JURISDICTION.

The judgment of the United States Court of Claims was entered into November 9, 1967.

The jurisdiction of the Supreme Court is invoked under 28 U. S. C. § 1255(1).

STATUTE AND REGULATIONS INVOLVED.

The statutory provision involved is Title II of the First War Powers Act (50 U. S. C., APP. 611). The regulations involved are ASPR 3-219.5(a), 32 CFR 3.219.5(a) 1954); ASPR 1-802, 32 CFR 1.802 (1967); ASPR 1-803(a)(1), 32 CFR 1.803(a)(1)(1967); ASPR 3-219.4 (c), 32 CFR 3.219-4(c)(1954); ASPR 1-302.4, 32 CFR 1.302.4 (1954); APP 30-404.

QUESTIONS PRESENTED.

1. Is a contracting officer obligated to disclose during the course of contract negotiations information solely in his possession regarding changes in circumstances affecting the represented price paid to another contractor where under set-aside regulations the price under both procurements was inter-related; or are contractors required to negotiate set-aside contracts at their peril?

2. Whether a contractor is entitled to reformation of its contract where a contractor's mistake as to his legal rights was induced by the misrepresentations, innocent or otherwise, of a Government contracting officer on whose knowledge Petitioner had a right to rely.

3. Whether pertinent Armed Services Procurement Regulations dealing with set-aside contracts for economically depressed areas prohibit the granting of a unit price in the basic set-aside contract that exceeds the award price of the non-set-aside contract despite the fact that the material provisions of the set-aside contract differ substantially from those of the non-set-aside contract.

STATEMENT OF THE CASE.

Sometime in 1953, responsibility for designing and developing a fire bomb to meet specifications of, and for use by the Air Corps and for procuring and delivering a substantial quantity of such fire bombs, was assigned to the Chemical Corps. The Chemical Corps in turn assigned procurement responsibility for the fire bomb to its New York Chemical Procurement District. On or about May 14, 1954, that Procurement District issued an Invitation for Bids (IFB) for the manufacture and supply of 73,944 fire bombs on the basis of both F.O.B. origin and F.O.B. destination.

The invitation contained a note indicating that a "set-aside" procurement might be negotiated with firms located in labor surplus areas in accordance with pertinent provisions of the Armed Services Procurement Regulations. (ASPR.) Any bidder desiring to participate in such negotiations was invited to attach to its bid on the non-set-aside portion of the procurement a supplemental letter furnishing data as to its eligibility to negotiate for the potential set-aside portion. (App. 2a-3a, Opinion.)

The Petitioner was one of more than 50 bidders who responded to the IFB. Its manufacturing plant was located in Perry Court, Ohio, a coal mining area where chronic unemployment had existed for many years. Petitioner attached to its competitive bid a statement indicating its interest in, and eligibility for, negotiations on any set-aside portion of the fire bomb procurement. (App. 3a, Opinion.)

The contract for the non-set-aside portion of the procurement was awarded to The Aircraftsmen Company (Aircraftsmen) in late June, 1954. It called for the manufacture and delivery of 73,944 fire bombs at a delivery rate (after the first two months of production) of 8,000 bombs per month. (App. 4a, Opinion.) The original award

prices per bomb were $73.98 and $77.98 F.O.B. origin and destination respectively. However, a pre-award survey team had discovered a $2.056 error in Aircraftsmen's bid and, after the contract had been awarded, Aircraftsmen filed a mistake-in-bid claim with the General Accounting Office (GAO) requesting a price increase of $2.056 per bomb. In October, 1954, GAO approved Aircraftsmen's mistake-in-bid claim and the prices per bomb were increased to $76.036 and $79.836 F.O.B. origin and destination respectively.

Petitioner was the only bidder who was eligible to negotiate for a set-aside procurement of the fire bombs. The contracting officer responsible for the fire bomb procurement sent a letter to Petitioner under date of July 20, 1954 inviting Petitioner to bid on a set-aside quantity of 71,661 bombs with monthly deliveries commencing in April, 1955. In the letter, the contracting officer stated that set-aside procurements could be negotiated at prices no higher than those paid on the non-set-aside portion and advised Petitioner that the award to Aircraftsmen had been made at $73.98 per bomb F.O.B. origin. Petitioner rejected the invitation. (App. 4a-5a, Opinion.)

Shortly thereafter, the contracting officer, at the direction of his commanding officer, asked representatives of Petitioner whether the Company would be interested in negotiations if the maximum price were set at $76.036. The Court found that Petitioner's representatives told the contracting officer that Petitioner could not meet the $76.036 price either but then reconsidered their decision and informed the contracting officer that Petitioner was interested in negotiating for the set-aside portion of the fire bomb procurement. (App. 5a-6a, Opinion.) In the belief that negotiations with Petitioner had been terminated when Petitioner's representatives stated Petition-

er could not meet the $76.036 price per bomb, the contracting officer refused to negotiate with Petitioner. The decision of the contracting officer was appealed to the commanding General, Army Chemical Corps, Materiel Command. (MATCOM.)

After Petitioner had sent letters to the contracting officer offering to perform the contract at the $76.036 price per bomb, MATCOM directed the contracting officer to inquire as to whether the terms and conditions set forth in Petitioner's letters would apply to a production rate of 3,000 bombs per month. Petitioner answered in the affirmative. MATCOM then directed the contracting officer to continue negotiations with Petitioner and the contracting officer informed Petitioner by letter dated October 15, 1954 that he had been authorized to re-enter into negotiations for a contract at the optimum production rate of 3,000 bombs per month. (App. 6a, Opinion.) The production rate for the non-set-aside contract remained at 8,000 bombs per month. (App. 6a, Opinion.)

A series of negotiation conferences followed during which Petitioner's representatives vigorously pressed for an increase in the $76.036 price or consent to the inclusion in the contract of an escalation clause on material prices. The contracting officer consistently maintained that existing ASPR governing set-aside procurements did not permit him to consider any unit price in the basic contract in excess of Aircraftsmen's contract price. Petitioner's representatives contended that Aircraftsmen's contract price was no longer controlling because of the fact that the Government had reduced the production rate of 8,000 per month in Aircraftsmen's contract to 3,000 per month for the set-aside procurement. (App. 7a-8a, Opinion.)

In the interest of providing work for the persons in its critically distressed area, Petitioner stated it would

accept the Government's conditions if they were mandatory and not susceptible to revision. Petitioner continued to urge the Government to allow it an increase over the $76.036 price. Negotiations continued on the contract into February, 1955. (App. 7a-8a, Opinion.)

Meanwhile, Aircraftsmen was experiencing substantial difficulties in manufacturing and delivering fire bombs. In late January, 1955, representatives of Aircraftsmen called the contracting officer and informed him that increases in the price of aluminum could affect Aircraftsmen disastrously if an aluminum price escalation clause was not included in its contract. On January 31, 1955, Aircraftsmen wrote the contracting officer and requested the inclusion of an aluminum price escalation clause in its contract.

In early February, 1955, the contracting officer visited Aircraftsmen's plant in Los Angeles to discuss the problems confronting Aircraftsmen. This visit was undertaken after the New York Procurement District personnel had reviewed the Aircraftsmen situation at a staff meeting with representatives of the Company. On February 11, 1955, Aircraftsmen wrote the contracting officer and formally requested a progress payments program. Aircraftsmen included in said letter a financial statement showing it had been unable to pay approximately two-thirds of the expenses which it had incurred in the performance of its contract. (App. 46a-47a, Opinion.)

On February 15, 1955, the contracting officer responded to Aircraftsmen's letter of January 31, 1955 requesting an aluminum escalation clause. He inquired whether Aircraftsmen desired its request to be considered as a claim under Section 30, Part IV of the Army Procurement Regulations (APP.) and, if so, he suggested that Aircraftsmen should elaborate its claim on appropriate forms,

copies of which he offered to furnish. By a letter marked "Air Mail" and dated February 23, 1955, Aircraftsmen advised the contracting officer that it did desire its request for an aluminum escalation clause to be treated as a claim under Section 30, Part IV of APP and attached thereto its application for relief with supporting documentation. The letter was date stamped as having been received by the contracting officer on March 2, 1955. The Court below found there was no satisfactory evidence in the record to explain the reason for the lengthy time lapse except the possibility that the documents may have been hand carried. (App. Opinion, 48a.)

Petitioner executed its contract with the Government on February 28, 1955. The contracting officer had never disclosed to Petitioner that Aircraftsmen was encountering production difficulties nor that Aircraftsmen was encountering severe financial problems in the performance of the non-set-aside contract and had requested financial relief. Petitioner entered into the performance of its contract and despite financial losses suffered in producing the fire bombs, delivered the last of the fire bombs to the Government in March 1958.

Aircraftsmen suffered losses also and submitted claims for relief under Title II of the First War Powers Act (50 U. S. C. App. Sec. 611). On October 3, 1955, the contracting officer submitted a favorable preliminary recommendation certifying that Aircraftsmen's financial distress was caused by a number of factors, namely: (a) an original underestimation of costs; (b) lack of extensive working capital to carry a contract of such magnitude during shutdown periods necessitated by change orders; and (c) failure to anticipate a rising market in a basic commodity. (App. 50a, Opinion.) On October 17, 1955, Aircraftsmen was granted an increase in the price

per bomb to $87.9391 retroactive to the first bomb produced. Despite the relief it obtained, Aircraftsmen was unable to meet its delivery schedule and the Government terminated Aircraftsmen's contract in March, 1956. (App. 50a-51a, Opinion.)

Petitioner sought relief under Title II, First War Powers Act, in October, 1956. The Army Contract Adjustment Board denied Petitioner's application in June, 1957 stating that it was unable to find that the current productive capacity of Petitioner and its parent company, Lempco Products, Inc., would be substantially impaired as a result of the losses suffered. Petitioner requested the Board to reconsider its decision on December 11, 1957. The Board denied the request for reconsideration on March 25, 1958. (App. 53a-54a, Opinion.)

Petitioner initiated the present case against the United States in the Court of Claims, contending: (1) that the contracting officer's intentional concealment of information material to the negotiations which was solely in his possession constituted actual fraud which misled Petitioner to its detriment and, thus, Petitioner was entitled to reformation of its contract; (2) that assuming the contracting officer's failure to disclose information material to the negotiations was not intentional, then such failure constituted constructive fraud, and thus, Petitioner was entitled to the relief sought in its Petition; (3) that the parties entered into the basic contract under a mutual mistake of fact; (4) that the contracting officer violated the standards of fair play and good faith and knowingly took an unconscionable advantage of the inferior bargaining position of Petitioner, and, therefore, Petitioner was entitled to the relief sought in its Petition; and (5) that the contracting officer, by insisting that applicable regulations prohibited his granting Petitioner a price per bomb in ex-

cess of the award price in the non-set-aside contract, erred in his interpretation of the applicable regulations, induced Petitioner mistakenly to believe it could not receive an increase in its unit price because of the reduced production rate in the set-aside contract and, thus, Petitioner was entitled to reformation of its contract.

Pursuant to Court of Claims Rule 53(a), Petitioner's case was referred to a Commissioner for action pursuant to Rule 52(b) of said Rules. On October 21, 1966, in compliance with Rule 57, the Commissioner filed his opinion which dismissed Petitioner's Petition.

The Commissioner rejected the first and second contentions stating that the most the record in this case could be said to support was that the contracting officer had become aware in a general way that Aircraftsmen was experiencing both production and financial difficulties in the performance of its contract and that the contracting officer had only surmises, not verified facts, as to the nature of Aircraftsmen's problems. The Commissioner said the contracting officer could not be charged with fraud, either actual or constructive, in failing to disclose facts which he did not actually know to be facts. (App. 17a-18a, Opinion.) The Commissioner rejected the third contention on the ground that the written contract precisely expressed the terms and conditions upon which both parties had agreed in their antecedent negotiations. (App. 15a, Opinion.)

The Commissioner did not expressly reject the fourth contention. Apparently, the fourth contention was not discussed because of the Commissioner's ruling on the first and second contentions. The Commissioner did not rule on Petitioner's fifth contention. (App. 13a-15a, Opinion.) The Commissioner merely noted that both par-

ties had persuasive arguments regarding the proper interpretation of the applicable regulations.

Petitioner filed Exceptions to the Commissioner's Report to the Court of Claims. In a per curiam opinion, Judge Nichols dissenting, the Court of Claims adopted the Commissioner's findings of fact, opinion and recommended conclusion of law.

Judge Nichols dissented on the basis that a ground rule had been established in the negotiations that the Government would not pay more than the Aircraftsmen price and Petitioner would not take less and that, under the circumstances of this case, the contracting officer was under a duty to warn Petitioner before its contract was executed by both parties if he entertained any expectation that the Aircraftsmen price might not hold firm. (App. 20a-21a, Opinion.) Judge Nichols further stated that:

> "* * * The commissioner says (in the opinion, not the findings) that before the award to plaintiff the contracting officer had 'only surmises, not verified facts, as to the nature of Aircraftsmen's problems * * *.' To sustain the result reached, it is vital that this characterization be correct. The commissioner had the officer before him as a witness, and no doubt was as well situated to look into the man's mind as triers of fact ever are. But I question whether any well advised contracting officer would throw out such a broad hint to a contractor to apply for the extraordinary relief, available only to contractors in grave enough difficulty, under Title II, as this one did on February 15, (Finding 30), because of troubles he merely surmised. Their letter to him of February 11, (Finding 29), I would hold of itself afforded more than surmise, disclosing as it did that they had been unable to pay approximately two-thirds of their expenses. I do not think 'surmise' is the *mot juste*, and if the commissioner had selected one more in accord with his detail

findings, the result might well have been different. I miss here the equitable approach of National Presto Industries, Inc. v. United States, 167 Ct. Cl. 749, 338 F.2d 99 (1964). If this case is not to go down in history as an instance of atavism in the evolution of law, it must be explained in the peculiar, and to me inexplicable, view the court and the commissioner take as to the ultimate facts." (App. 21a-22a, Opinion.)

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Claims enunciates a novel but nevertheless fundamental principle that during negotiations a contracting officer need not divulge to a contractor information in his possession which is relevant and material to the contract but which he has not verified as being accurate or true. The Court of Claims has said, in effect, that a contracting officer may be in sole possession of certain facts material to the negotiations for a contract which, if true, would most certainly affect the decision of the contractor to enter into a contract but need not make the contractor aware of said information until he has verified the accuracy of the information even though the contractor may, in the meantime, execute the contract and thus unwittingly plunge into an abyss from which there is no escape.

The Court of Claims did not even limit the above rule by requiring the contracting officer to suspend negotiations with the contractor until he investigated and ascertained whether the information was accurate or not. Thus, a contracting officer may, under the rule enunciated by the Court of Claims, wait until after a contractor with whom he is dealing executes his contract before ascertaining whether the information material to negotiations which came into his possession during negotiations is accurate. If the contract subsequently proves to be a ruinous one for

the contractor, the Government is absolved of all responsibility for failing to either divulge the information or suspend the negotiations until the information could be verified. The new rule actually encourages a contracting officer not to investigate and verify information in his possession which the contractor needs but would not have any way of obtaining.

The Court of Claims has for many years adhered to the rule that where the Government possesses vital information which it is aware a contractor needs but would not have, it cannot properly remain silent and betray a contractor into a ruinous course of action. *Albert & Harrison, Inc. v. United States,* 68 F.Supp. 732 (Ct. Cl. 1946); *Potashnick v. United States,* 105 F.Supp. 837 (Ct. Cl. 1952); *Ragonese v. United States,* 120 F.Supp. 768 (Ct. Cl. 1954); *Bateson-Stolte, Inc. v. United States,* 172 F. Supp. 454 (Ct. Cl. 1959); *Snyder-Lynch Motors, Inc. v. United States,* 292 F.2d 907 (Ct. Cl. 1961); *Helene Curtis Industries, Inc. v. United States,* 312 F.2d 774 (Ct. Cl. 1963); *National Presto Industries, Inc. v. United States,* 338 F.2d 99 (Ct. Cl. 1964); *Chernick v. United States,* 372 F.2d 492 (Ct. Cl. 1967); *Maxwell Dynamometer Company v. United States,* No. 120-62 _____ Ct. Cl. _____ (decided Nov. 9, 1967). Adherence to said rule is particularly important in cases such as the one at bar where the Government has asserted that the price per bomb to be paid to Petitioner could not exceed the price paid per bomb to Aircraftsmen.

The Court of Claims has now made a basic change in the long-established rule and has stated that during contract negotiations, the Government need not divulge vital information which it is aware a contractor needs but would not have, until after it has verified the information. Such a basic change in the law applicable to approximately

180 billion dollars in Government contracts per year ought not be made without any appellate review.

A rule of contract law followed for many decades and uniformly endorsed by the courts forms an unusually solid foundation for reliance by parties on the duties and obligations of one party to the other in government contract negotiations. The rule requiring the divulgence of vital information which the Government knows a contractor needs but would not have is such a rule. Petitioner believes that the new rule stated by the Court of Claims in this case is as wrong in principle as it will be upsetting in practice, for it clearly places contractors at the complete mercy of the Government procurement officials. At the very least, the new rule merits full consideration by the Court.

2. In 1954-55, the ASPR dealing with set-aside contracts prohibited the payment of a price differential to the contractor producing the set-aside portion of a procurement. (ASPR 3.219.5(a), 32 CFR 3.219.5(a) (1954).) While the ASPR just cited was deleted on October 9, 1959 by Amendment 47, 24 FR 8219, the pertinent language of that regulation has been incorporated into ASPR 1-802, 32 CFR 1.802 (1967); ASPR 1-803(a)(i), 32 CFR 1.803(a)(1) (1967). The aforesaid procurement regulations are set forth in full in the Appendix.

During the negotiations for a contract, the Government reduced the production rate, in Petitioner's contract, from 8,000 bombs per month to 3,000 bombs per month. The contract of the non-set-aside contractor, Aircraftsmen, was not changed. Petitioner requested an increase in the price to be paid per bomb or the inclusion of an escalation clause in its contract for the reduction in production rate greatly increased the time period within which the contract was to be performed and thus exposed Petitioner to

probable increases in cost of material and other increases in cost that Aircraftsmen would not have to contend with.

The contracting officer refused to grant Petitioner's requests stating in a forceful and unequivocal manner that the ASPR's dealing with "set-aside" contracts prohibited the granting of a unit price in the basic set-aside contract that would exceed the award price of the non-set-aside contract. Petitioner entered into a contract with the Government in reliance on the contracting officer's interpretation of the pertinent ASPR.

In the Court below, Petitioner contended that it was entitled to reformation of its contract because the contracting officer erred in his interpretation of the pertinent regulations and that Petitioner reasonably relied upon the representations of the contracting officer to its detriment. Petitioner contended that the prohibition in the regulations against a price differential was intended to apply only where all material provisions in the two contracts, the non-set-aside and the set-aside contracts, were the same.

The Trial Commissioner stated in his opinion, which was adopted by the Court below, that:

> "Whether the contracting officer was right or wrong in this interpretation of the set-aside regulations seems beside the point. Typically, the remedy of reformation is intended to give relief from a contract which does not conform to antecedent expressions on which the parties have agreed. It is not a proper remedy for the enforcement of terms to which the defendant never assented." (App. 13a-14a, Opinion.)

In so stating, the Trial Commissioner and the Court of Claims rejected Petitioner's argument that the proper rule of contract law in cases such as this is as follows:

"If the mistake of law that induced the making or the performance of a contract by one party was caused by a fraudulent misrepresentation of the law by the other, or by his innocent misrepresentation if the relations of the parties are such as to make it reasonable for the one to rely upon the representations of the other, the appropriate relief by rescission, restitution, or reformation will be given the injured party. * * *" 3 *Corbin*, Contracts § 618 (1960). See also: *Staten Island Hygeia Ice & Cold Storage Co. v. United States*, 85 F.2d 68, 71-72 (2d Cir. 1936).

The Court of Claims refused to decide whether the contracting officer's interpretation of the set-aside regulations was right or wrong on the ground that reformation was not the proper remedy even if he was wrong in his interpretation. One flaw in the Court of Claims' analysis is that there is a rule of contract law which *does* permit reformation of a contract in cases such as this. Petitioner submits that it is entitled to continued recognition of said rule of contract law.

Moreover, the decision of the Court of Claims has left unclear the proper interpretation of the set-aside regulations. The Government has asserted that the price to be paid per unit in a set-aside contract can never exceed the award price per unit in the non-set-aside contract regardless of the differences that may exist in the terms and conditions of the two contracts. Petitioner has stated this interpretation is erroneous. The Court of Claims found both positions persuasive.

In view of the Government's expressed policy of alleviating the plight of workers in economically depressed areas by placing set-aside contracts in said areas and the large number of Government contracts involved, it is vitally important that this issue be resolved. The unset-

tling consequences of the decision of the Court of Claims can only be forestalled by a decision of this Court finally resolving the question left unanswered below.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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February 1968.

APPENDIX